No. 12591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN H. FAHEY, *et al.*,

Appellants,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD FITZPATRICK,

Appellees.

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

O'MELVENY & MYERS, W. I. GILBERT, JR., and RICHARD FITZPATRICK,

Appellees.

Brief of Appellees O'Melveny & Myers and Richard Fitzpatrick (Counsel for Federal Home Loan Bank of Los Angeles and Certain of Its Member Associations).

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Brief of Appellees O'Melveny & Myers and Richard Fitzpatrick (Counsel for Federal Home Loan Bank of Los Angeles and Certain of Its Member Associations).

This appeal is taken from an order [R. 1/288*] allowing attorneys' fees on account to appellees above named for services rendered to Federal Home Loan Bank of Los

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*Denoting Volume I of the printed Record herein, page 288.

Angeles (hereinafter "Los Angeles Bank") and certain of its member associations, and to appellee W. I. Gilbert, Jr., for services rendered to First Federal Savings & Loan Association of Wilmington. The services in question were rendered in and with relation to the consolidated actions of *Federal Home Loan Bank of Los Angeles v. Federal Home Loan Bank of Portland* (hereinafter "San Francisco Bank"), etc., *et al.,* No. 5678-PH below, and *Mallonee, et al. v. Fahey, et al.,* No. 5441-PH below.

Jurisdictional Statement.

The complaint of Los Angeles Bank in Action No. 5678-PH (the so-called "Los Angeles action") and the cross-claim of that Bank in Action No. 5441-PH (the so-called Mallonee action) accurately described their respective natures as being, respectively, a complaint and cross-claim to enforce legal and equitable claims to, to obtain possession of and to remove liens from and clouds upon title to, property and for other and general relief. [12511 R. 20/9465-6*; 12511 R. 2/564.] Jurisdiction was invoked under the fifth amendment of the Constitution and under old Section 57 of the Judicial Code (then 28 U. S. C., Sec. 118, now 28 U. S. C., Sec. 1655) and under Sections 3, 12, 17, 25 and 26 of the Federal Home Loan Bank Act (July 22, 1932, 47 Stat. 725 *et seq.,* 12 U. S. C., Secs. 1421-1449); and the complaint (as did the cross-claim) alleged in terms that the activities complained of had operated to deprive Los Angeles Bank and its member shareholders of their property without due process of law,

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*Denoting, pursuant to order, R. 2/875, Vol. XX, of printed Record in Appeal No. 12511 in this Court, pages 9455 and 9456. Other references to such Record will be similarly indicated.

to cast a cloud upon their title and other interests as to such property, and that the claims of the defendants with reference thereto were wholly without right. [12511 R. 20/9466, 9476, 9485, 9491-3.] It was also alleged that the matter in controversy exceeded, exclusive of interest and costs, the sum of $45,000,000 as to the first (Los Angeles Bank) count and the sum of $14,000,000 as to the second (the five member associations count). [12511 R. 20/9466, 9485-6.] The first count was, and the second count was not, duplicated in the cross-claim. The prayer in each of such pleadings was in the conventional form of an action *quasi in rem* to remove a cloud on title, to quiet title and to regain possession. [12511 R. 20/9493; *ibid.* 2/583.]

Appellants invoke the jurisdiction of this Court under 28 U. S. C., Section 1291.

Statement of the Case.

Although this appeal concerns the propriety of an interim allowance of attorneys' fees, an outline of the actual issues tendered by the complaint in the Los Angeles case (and duplicated in the Los Angeles cross-claim in the *Mallonee* action) will perhaps be helpful. The complaint in the Los Angeles case alleged in substance the following facts:

1. On March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over $45,000,000 of value in assets and properties. [12511 R. 20/9469.] It held some $14,000,000 in value of securities pledged or deposited with it for safe-keeping by its member associations including the five appellee associations earlier mentioned

herein. [12511 R. 20/9485-6.] All of these assets and properties were in the State of California. [12511 R. 20/9476.]

2. On said date of March 29, 1946, defendant John H. Fahey, then purportedly acting as Federal Home Loan Bank Commissioner (since succeeded by appellant Home Loan Bank Board), without prior notice, hearing, or opportunity to be heard, arbitrarily and unlawfully seized the Los Angeles Bank and its assets, turned out its officers and purported to do each of the things specified in his purported orders Nos. 5082, 5083, and 5084 [12511 R. 20/9470-74], which orders provided in substance as follows:

a. *Order No. 5082:* Los Angeles Bank was to be liquidated and reorganized; its assets and properties were "hereby" transferred to the Portland Bank; the liabilities of the Los Angeles Bank were to be "assumed by" and were "hereby declared to be" liabilities of the Portland Bank; the president of the Portland Bank was authorized to sign documents in behalf of Los Angeles Bank; the members of the Los Angeles Bank were to become members of the Portland Bank; the Portland Bank was to be moved to San Francisco and to be thereafter known as the San Francisco Bank; the Portland Bank officers, directors, etc., were to act as such for the San Francisco Bank for the calendar year 1946 and the Portland charter was to govern the San Francisco Bank until "changed"; the San Francisco Bank was to operate branches at Portland and Los Angeles; (then followed further provisions for replacement of officers and directors, etc.).

b. *Order No. 5083:* The District of the Portland Bank was readjusted to include Arizona, California, Nevada and Hawaii; the Portland Bank was moved to

San Francisco and was thenceforth to be known as the San Francisco Bank.

c. *Order No. 5084:* The Los Angeles Bank was dissolved.

3. Orders Nos. 5082, 5083 and 5084 were published in the Federal Register; as a result of such orders, which defendants assert to be valid, defendants claim Portland (San Francisco) Bank to be the owner and entitled to the possession of the seized assets, which claim is wholly without right. [12511 R. 20/9475-6.]

4. Said orders and the things done under them operated to deprive Los Angeles Bank of its property without due process of law, constituted a trespass and a fraud in law upon its constitutional rights, and cast a cloud upon its rights, titles and interests as to the assets and properties in question. [12511 R. 20/9476.]

(The complaint then went on to charge in detail that the Commissioner's purported determination as to the necessity of seizing the Los Angeles Bank was untrue, sham and false and that in reality the seizure was the punitive culmination of a series of acts whereby the Commissioner had arbitrarily attempted to dominate the affairs of the Los Angeles Bank and to dictate to it as to who should fill an existing vacancy in its presidency. [12511 R. 20/9480-85.])

So far as the merits of this present appeal are concerned, a comparison of appellants' Specification of Errors (Br. p. 17) with the Findings of the District Court reveal that, among others, the following findings stand unchallenged upon this appeal:

1. That both the *Mallonee* and the *Los Angeles* actions, including the cross-claim of the Los Angeles Bank in the

Mallonee action, were commenced and at all times since have been prosecuted and maintained by plaintiffs therein and by cross-claimant Los Angeles Bank, through their respective counsel (including these appellees) in good faith and on reasonable grounds. [Findings 5 and 6, R. 1/291-3.]

2. On March 29, 1946, without notice, hearing or trial, the business, property and assets of Los Angeles Bank, in value some $46,000,000, and as well property and assets of its shareholder and member associations held by it as pledgee, depositary, custodian, trustee, bailee or otherwise, were, without notice, hearing or trial, seized by defendant Fahey and turned over, without consideration and without corporate action on the part of Portland Bank,* to said Portland Bank, whose name was then changed to San Francisco Bank. Los Angeles Bank was then entirely solvent and had a surplus of approximately $1,900,000. Said Los Angeles Bank was also, on said date of March 29, 1946, purportedly liquidated, consolidated and merged with Portland-San Francisco Bank and dissolved. Since said date Los Angeles Bank has been without property or assets with which to employ counsel. [Finding 7, R. 1/293-4.]

Appellants assign as "erroneous" (not, be it noted, as *clearly* erroneous: Fed. Rules of Civil Procedure, Rule 52 (a)) Findings 14, 15, 16, 17, 18 and 21 [R. 1/301-

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*And, it is not disputed, without corporate action on the part of Los Angeles Bank.

304] dealing with the rendition of services by appellees inuring to the benefit of their respective clients and the class represented by the suing associations in Count II of the complaint in the Los Angeles action, the value of the services rendered by appellees O'Melveny & Myers and Richard Fitzpatrick (not, be it noted, the value of the services—substantially in excess of $7,500—rendered by Mr. Gilbert) and the fact that the awards are interim in nature with no specific finding as to total value of services rendered.

Since, however, appellants mention none of these latter subjects either in the summary of their argument or in the argument itself, the conclusion is necessitated that these assignments are made only out of a super-abundance of caution and in aid of the points which they actually do discuss. From the standpoint of facts found, aside from their legal implications, it seems to be conceded that the value of the services rendered by O'Melveny & Myers and Richard Fitzpatrick was substantially [as found: R 1/303] in excess of $67,500,* and that the services rendered by appellees including Mr. Gilbert inured to the benefit of their respective clients. In a word, appellants' Specification of Error No. 3 (Br. p. 18) seems to be aimed at the legal question of compensability and not to the evidentiary support of the facts found.

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*Mr. Hubert Morrow testified as a qualified expert that the legal services rendered by O'Melveny & Myers and Richard Fitzpatrick were of the reasonable value of $175,000. [R. 1/356.] There was no evidence as to the contrary.

Summary of Argument.

1. The Los Angeles action is not an action brought, as such, to review the actions of the commissioner evidenced by his Orders Nos. 5082, 5083 and 5084. It is, on the contrary, a plenary equity action *quasi in rem* brought under former Judicial Code, Section 57.* Therein the effect of the orders above referred to, which concededly constitute the sole muniments of title under which the San Francisco Bank claims, is drawn in question purely as an incident to the District Court's inquiry into title, ownership and the right to possession of the assets and properties constituting the *res* before the Court. In addition to this, and as an incident to its basic jurisdiction *in rem,* the Court has acquired jurisdiction *in personam* of the San Francisco Bank, the party in actual possession of the assets and properties in dispute.

2. The activities of the commissioner leading up to the seizure of the demanded assets and properties are subject to judicial scrutiny.

3. The contention of appellants that neither the Los Angeles Bank nor its member associations have any standing to question the validity of the orders of March 29, 1946, is devoid of merit.

4. The contention of appellants that the Home Loan Bank Board and its members are indispensable parties is devoid of merit; as is the contention that these are unconsented suits againts the United States.

5. Under the plain provisions of 28 U. S. C., Section 1655, the District Court had and has plenary power and

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*Now 28 U. S. C. §1655.

jurisdiction to hear and determine all questions material to the claim of Los Angeles Bank and its member associations that their respective titles to the assets and properties in dispute should be quieted, that clouds upon such titles should be removed and that possession of such assets and properties should be restored to their rightful owners.

6. Upon the case made by the pleadings in the actions below and by the findings in this proceeding, Los Angeles Bank is in precisely the same situation as is any corporation whose assets are seized by public authority in visitatorial proceedings.

a. In such a case, the corporation, acting in good faith, is entitled to its day in court to contest the validity of the seizure: and, irrespective of whether or not a case is ultimately made out for the interference of state or governmental authority, it is entitled to an allowance of fees to its attorneys. Otherwise, as the cases say, it would be hamstrung in any bona fide effort to defend itself.

7. Under such circumstances, an *interim* allowance of attorneys' fees is proper. The test is not that of ultimate success or failure in the litigation; it is whether or not the defense or the cause of action, as the case may be, is, as the District Court here found, conducted in good faith and on reasonable grounds.

8. The District Court did not err in directing payment of the attorneys' fees out of moneys in the registry of the court; and appellants' arguments to the contrary are moot and academic.

I.

The Los Angeles Action Is Not an Action Brought, as Such, to Review the Actions of the Commissioner Evidenced by His Orders Nos. 5082, 5083 and 5084. It Is, on the Contrary, a Plenary Equity Action Quasi in Rem Brought Under Former Judicial Code, Section 57. Therein the Effect of the Orders Above Referred to, Which Concededly Constitute the Sole Muniments of Title Under Which the San Francisco Bank Claims, Is Drawn in Question Purely as an Incident to the District Court's Inquiry into Title, Ownership and the Right to Possession of the Assets and Properties Constituting the Res Before the Court. In Addition to This, and as an Incident to Its Basic Jurisdiction In Rem, the Court Has Acquired Jurisdiction In Personam of the San Francisco Bank, the Party in Actual Possession of the Assets and Properties in Dispute.

Appellants' main thesis: that the Los Angeles action is brought to "review" the Commissioner's actions culminating in the seizure of the Los Angeles Bank's assets pursuant to Orders Nos. 5082, 5083 and 5084, exhibits nothing more than a studious attempt to misunderstand the true nature of the action.

A reading of the complaint makes it perfectly obvious that all of the elements of the conventional cause of action in equity by an owner out of possession* to quiet title, to remove a cloud on title and to regain possession are present. Ownership and right to possession in the Los An-

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*Compare *Holland v. Challen,* 110 U. S. 15; *Southern Pacific R. R. Co. v. Stanley* (S. D. Cal.), 49 Fed. 263; *Hyatt v. Colkins,* 174 Cal. 580.

geles Bank down to March 29, 1946, deprivation of possession as of that date, an adverse claim under color of title (evidenced by the three orders as published in the Federal Register), plus the customary allegation that such claim is wholly without right, are all set forth.

So viewed, and correctly viewed, the Los Angeles complaint is open to neither of the interpretations which appellants seek to put upon it. The action is purely and simply an equitable action *quasi in rem* to try title as between one who alleges itself to be an owner out of possession—the Los Angeles Bank—and one who alleges itself to be an owner in possession—the San Francisco Bank. The later claims, as its sole muniment of title, the three administrative orders of March 29, 1946, and particularly Order No. 5082, the purported instrument of transfer. The question presented, therefore, is whether or not the orders in question did or did not operate to pass title to the disputed assets and properties; a question which is present, generally as regards a deed or other instrument under which the defendant claims, in any quiet title suit or action to remove a cloud on title.

This is certainly a question which the District Court has jurisdiction to determine, whether its ultimate decision be right or wrong. And the decision of this question calls for no species of *review* of the administrative orders, in the sense in which appellants use the term. The question is, not whether the orders should be set aside, in the administrative sense, but whether they, and particularly Order No. 5082, operated to transfer title to the San Francisco Bank. It is the contention of the latter that the orders did have this effect. It is the contention of the Los Angeles Bank that they did not; that from the standpoint of legal title the orders had no more effect than would a

wild deed, executed in favor of the San Francisco Bank by a third party (here the Commissioner) not connected with the title. These are questions for the District Court to determine, along with the other questions which appellants raise on this appeal, and none of which go to the *jurisdiction* of the District Court. *All* of these questions go to the merits of the key question below, which is: Did or did not the orders in question pass title to the demanded assets and properties? And it is certainly a novel experience to the writers of this brief that an appellate court should be asked to decide this question in advance of a trial on the merits.

Appellants seem to lay stress upon the fact that the prayer in the Los Angeles complaint asks that the orders in question be declared to be null and void and that any clouds or liens created thereby be removed. This is no more than would be prayed as to any wild deed or other instrument clouding or otherwise affecting a valid title. It certainly does not call for a setting aside of the orders as in the case of an administrative review.

However, and in any event, and without expressing any further opinion upon the subject, if it should appear that such relief as prayed goes too far, it is nevertheless obvious that this particular objection relates merely to the form of the decree to be rendered. The District Court, having jurisdiction *in personam* over the San Francisco Bank, has plenary power to adjudicate the San Francisco Bank a constructive trustee and order it to return the demanded assets and properties without in any way touching the orders in question. Such action would clearly be within the powers of a court of equity, in a proceeding *quasi-in rem*. (*Title Insurance and Trust Co. v. California Development Co.*, 171 Cal. 173, 198-199.)

Such relief *in personam* would be purely in aid of and incidental to the exercise of the court's jurisdiction *in rem* over the assets and properties themselves. (*Jellenik v. Huron Copper Mining Co.,* 177 U. S. 1; *Harvey v. Harvey* (7 Cir.), 290 Fed. 653.)

The true nature of the incidental powers of the court in an action of this type is excellently set forth in *Harvey v. Harvey, supra,* where the court said:

> "Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based upon service under Section 57, which applies to actions *in rem,* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res.* It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *statu quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. Incidental to its jurisdiction over the *res,* the court may use its power of injunction not to prevent distinctly personal acts by the defendants disconnected with the *res,* but to prevent the defendants interfering with, disposing of, converting, injuring, or wrongfully using the *res.*" (290 Fed. at p. 659.)

Therefore, contrary to appellants' views upon the subject, the orders of March 29, 1946, are involved in the Los Angeles action only as an incident to a determination by a court of equity having jurisdiction over a specific *res,* of title and right to possession of that *res.*

II.

The Activities of the Commissioner Leading Up to the Seizure of the Demanded Assets and Properties Are Subject to Judicial Scrutiny.

Section 26 of the Federal Home Loan Bank Act, as amended, 12 U. S. C., Section 1446, under which the Commissioner purported to act in seizing the demanded assets, confers a power and prescribes a procedure for the liquidation or reorganization of a federal home loan bank. Among other things, the Commissioner (the Commissioner succeeded to the powers of the Federal Home Loan Bank Board under Executive Order No. 9070) must make a finding; and he must also pay off and retire the outstanding stock of the bank, in whole or in part. Appellants argue that as a matter of statutory construction, the court should imply from the Act that the Commissioner was given final and absolute discretion in dissolving and reorganizing a bank, without any right of judicial review whatever. Granting the power to liquidate *or* reorganize, the procedure therefor is set forth in the statute and must be followed. (*Ohio Bell Telephone Co. v. Public Utilities Comm.,* 301 U. S. 292, 304.) This process expressly included paying off and retiring the stock of the bank in whole or in part. This process, the Los Angeles complaint alleges (and we do not understand the fact to be disputed), was not followed here. And it is as true of the Commissioner as of any other administrative agency that where, as here, a particular mode of exercising a power is conferred by law, *the mode is the measure of the power.* (*Reams v. Cooley,* 171 Cal. 150; *Cowell Lime & Cement Co. v. Williams,* 182 Cal. 691.) The question of whether the Commissioner did or did not exercise his power in the mode prescribed is of course a *judicial* question; which of course means a question reviewable by a *court.*

Section 26 also requires a *finding* of efficiency and economy in the accomplishment of the purposes of the Act. The Commissioner here made no *finding* whatever. He did make a purported *determination* that the efficient and economical accomplishment of the purposes of the Act would be aided by his contemplated action. (Order No. 5082.) It is obvious that a *finding,* as required by the statute, imports a hearing, based upon evidence, before any "determination" or other decision may be arrived at. A "finding" of the existence of certain facts presupposes some hearing of evidence tending to prove such facts. (*Abraham v. Daugherty,* 60 Cal. App. 297, 302; *California Employment Comm'r v. Malm,* 59 Cal. App. 2d 322, 324; *Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm'r* (Ill.), 130 N. E. 693, 696.)

The fact that the Commissioner purported to make a "determination" rather than the finding which the statute prescribes is in itself persuasive evidence that he was unable to find, *from evidence,* any *facts* which would have supported his determination; and, of course, it is not open to dispute that the Commissioner acted without affording the Los Angeles Bank or its members any notice or hearing whatever. But again, the question of whether the Commissioner did or did not make a finding and, if so, whether such finding was supported by evidence, are *judicial* questions, as is the further question, tendered by the Los Angeles complaint, that the Portland Bank did not *acquire* the assets of the Los Angeles Bank, with the approval of the Board, as the Act provides, but that instead the Los Angeles assets were thrust upon the Portland Bank by the Commissioner without any affirmative corporate action whatever by either bank.

Furthermore, under general principles of jurisprudence the right of appeal to the courts in the case of administrative action of an arbitrary or capricious nature which as here, directly affects property rights is established. (*Markall v. Bowles,* 58 Fed. Supp. 463 (D. C., N. D., Cal.).) Under such circumstances Federal courts will read the requirements of due process into the Act, and due process means a hearing; therefore, a hearing is an integral part of the Federal Home Loan Bank Act, just as much as if the Act itself in words stated that a hearing should be held. (*Cf., Eisler v. Clark,* 77 Fed. Supp. 610 (D. C., D. C.) *cert. denied,* 338 U. S. 879.) In many cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, the courts have power to review it and set it aside. (*Gadsden v. United States,* 78 Fed. Supp. 126 (Ct. Claims); *Southern Railway Co. v. Virginia,* 290 U. S. 190, 194 *et seq.; Londoner v. Denver,* 210 U. S. 373, 386; *Standard Airlines v. Civil Aeronautics Board,* 177 F. 2d 18, 20 (D. C. Cir.); *Stark v. Brannan,* 82 Fed. Supp. 614, 617 (D. C., D. C.).)

The test seems to be this: That if an administrative agency merely *advises,* a hearing in the due process sense may not necessarily be required; but where, as here, the agency *ordains,* in such a manner as to impinge upon property rights, a due process (which means a *full and fair*) hearing is required at the administrative level in order to facilitate attendant judicial review. (*Norwegian Nitrogen Products Co. v. U. S.,* 288 U. S. 294, 318-319; *Morgan v. U. S.,* 304 U. S. 1; *I. C. C. v. L. & N. R. Co.,* 227 U. S. 88; *Ohio Bell Telephone Co. v. Public Utilities Com.,* 301 U. S. 292.)

There can certainly be no question here but that the Commissioner *ordained* here. He ordained that $45,000,000 of assets lawfully owned or possessed by the Los Angeles Bank should, by mere official *fiat,* be transferred to the Portland Bank. That his ordainment impinged upon the property rights of both the Los Angeles Bank and its depositor or pledgor members is self-evident. Under these circumstances, appellants' argument, that neither the bank nor its members' property rights were affected by the seizure, wholly fails to stand scrutiny.

The basic principle is that due process requirements are satisfied *if, and only if, at any time before governmental action with reference to property rights becomes final, hearings are allowed either by administrative or by judicial action.* Davis, "The Requirement of Opportunity to Be Heard in the Administrative Process," 51 Yale Law Journal 1093, 1136 (1942). It is conceded that the Los Angeles Bank received no hearing at the administrative level. It is therefore entitled to it *now,* when the matter is pending before a *court.* Otherwise, it is respectfully submitted, the plain mandate of the Fifth Amendment will have been violated. This means that the District Court is empowered, as a matter of due process of law, to scrutinize the activities of the Commissioner here complained of, in addition to its plenary jurisdiction in equity to adjudicate title and the right to possession to the assets and properties over which it has acquired jurisdiction.

What has been said above should dispose of the contention that the activities of the Commissioner are not subject to judicial review. Such a plea in the face of the charge of arbitrary action directly affecting the prop-

erty rights of the plaintiffs in the Los Angeles action simply cannot be justified. And this is particularly true where, as in the pattern of the Federal Home Loan Bank Act, no administrative review is provided. This merely means, in the eyes of equity, that no adequate remedy at law has been provided for the protection of the property rights of those plaintiffs against arbitrary action; in itself, a valid ground of equity jurisdiction.

Baldly stated, the position of appellants seems to be that no justiciable question is presented by the fact that a public officer has seized the property of a private person in a manner not authorized by the statute under which he purports to act.

This position is belied by all of the authorities. As said in *Land v. Dollar,* 330 U. S. 731:

> "If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.
>
> "If viewed in that posture, the case is very close to *United States v. Lee,* 106 U. S. 196. That was an action in ejectment to recover possession of a tract of land. The defendants were military officers who, acting under orders of the President, took possession of the land and converted one part into a fort and another into a cemetery. For the lawfulness of their possession they relied on a tax sale of the property to the United States. On the trial it was held that the claim of the plaintiffs to the land was valid and that the defendants were wrongfully in possession. The Court affirmed the judgment over the objection that the suit was one against the

United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. And see *Philadelphia Co. v. Stimson,* 223 U. S. 605, 619-620; *Sloan Shipyards Corp. v. United States Fleet Corp.,* 258 U. S. 549, 567.

"Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee, supra,* has been repeatedly approved. *Cunningham v. Macon & Brunswick R. Co.,* 109 U. S. 446, 452; *Tindal v. Wesley,* 167 U. S. 204; *Smith v. Reeves,* 178 U. S. 436, 439; *Scranton v. Wheeler,* 179 U. S. 141, 152-153; *Philadelphia Co. v. Stimson, supra,* pp. 619-620; *Goltra v. Weeks,* 271 U. S. 536, 545; *Ickes v. Fox,* 300 U. S. 82, 96; *Great Northern Life Ins. Co. v. Read,* 322 U. S. 47, 50-51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States v. Lee, supra,* record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. . . ." (330 U. S. at pp. 736-737.)

What appellants overlook is the patent fact that if the Commissioner exceeded his statutory authority in seizing the property of the Los Angeles Bank, he and his confederates were nothing other than tort-feasors. As also said in *Land v. Dollar:*

> ". . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.
>
> "It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. . . ." (330 U. S. at p. 738.)

Appellants mention, and vainly attempt to distinguish the recent holding of the Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123. It is said that in that case justiciability was found to consist of an alleged injury to a legally protected right, *i. e.,* the right to be free from defamatory statements. By just what species of reasoning appellants arrive at the conclusion that the right to hold and deal in property free from unwarranted interference and spoliation under color of governmental authority is not a legally protected right, is not made clear.

Under Section 12 of the Act (12 U. S. C., Sec. 1432), federal home loan banks, such as the Los Angeles Bank, are empowered *"to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; . . ."** To assert, as appellants do assert, that such power may not be invoked to protect the bank's property from unwarranted seizure, would render the right to sue and to defend an empty one indeed.

As a matter of fact, the case made on the pleadings by the Los Angeles Bank and the member associations joining with it, falls precisely within the pattern of such cases as *United States v. Lee* and *Land v. Dollar.* Here, as there, a specific *res* or property (the property and assets, plus their derivatives, of the Los Angeles Bank as of March 29, 1946) is claimed to be withheld. Here, as there, the right to possession or enjoyment of property under general law is in issue. Here, as there, the assertion by officers of the Government of their authority to act does not foreclose judicial inquiry into the lawfulness of their action. And, last but not least, the determination of whether their authority is rightly assumed is the exercise of jurisdiction *and must lead to the decision of the merits of the question;* in other words, *the District Court had and has jurisdiction to determine its own jurisdiction by proceeding to a decision on the merits.*

The short of it is that appellants' contentions that the Commissioner's activities are not subject to judicial scrutiny are devoid of merit. There being present here, as there was in the *Joint Anti-Fascist* case, a legally pro-

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*Emphasis here, as elsewhere, is supplied unless otherwise noted.

tected right, the following language from that decision has full applicability here:

". . . The order contains the express requirement that each designation of an organization by the Attorney General on such a list shall be made only after an 'appropriate . . . determination' is prescribed in Part III, Sec. 3. An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.'* It is implicit in a government of laws and not of men. Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it." (341 U. S. at p. 136.)

* * * * * * * *

"Since we find that the conduct ascribed to the Attorney General by the complaint is patently arbitrary, the deference ordinarily due administrative construction of an administrative order is not sufficient to bring his alleged conduct within the authority conferred by Executive Order No. 9835. The doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot. . . ." (341 U. S. at pp. 137-138.)

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"11. The designation of these organizations was not preceded by any administrative hearing. The organizations received no notice that they were to

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*It will be recalled that here the Commissioner purported to make a "determination" in Order No. 5082, as distinguished from the *finding* required by Section 26 of the Act, and appellants' brief (p. 39) concedes the fact that no "formal" findings were made.

be listed, had no opportunity to present evidence on their own behalf and were not informed of the evidence on which the designations rest. See *Chin Yow v. United States,* 208 U. S. 8." (341 U. S., Footnote at p. 138.)

It is said that the action of the Commissioner in seizing the Los Angeles assets was quasi-legislative in nature. But an agency exercising quasi-legislative functions has no more power to deprive a person of property without due process of law than has any one else. (*Londoner v. Denver,* 210 U. S. 373, 385-6; *Interstate Commerce Com. v. Louisville & Nashville R. Co.,* 227 U. S. 88; *Ohio Bell Telephone Co. v. Public Utilities Com.,* 301 U. S. 292.)

In saying this, we are not to be understood as implying that we agree that the Commissioner was acting quasi-legislatively, as appellants contend. He was, in our judgment, acting administratively insofar as he stayed within the framework of the Act. When he exceeded his statutory authority, *and such is the charge here,* he became a mere tort-feasor whose purported transfer of the assets to the San Francisco Bank did not and could not operate to vest ownership in that bank. Whether he did or did not act in derogation of his powers under the Act is the question to be tried below; and under the doctrine of cases such as *United States v. Lee* and *Land v. Dollar,* the question of the jurisdiction of the District Court may only be determined after a trial on the merits. Appellants may meet the charges, but they cannot evade them.

III.

The Contention of Appellants That Neither the Los Angeles Bank nor Its Member Associations Have Any Standing to Question the Validity of the Orders of March 29, 1946, Is Devoid of Merit.

The contention of appellants in this regard seems to be predicated upon the theory, already commented upon herein, that the seizure of March 29, 1946, affected neither the property rights of these appellees nor their rights to be protected against tortious invasion. In the light of the allegations of the Los Angeles complaint, to state appellants' contention is to answer it. As we have seen, the complaint directly charges a tortious invasion of the property rights both of the Los Angeles Bank (rights of a value of $45,000.00), and of its member associations (rights valued at $14,000.00). Whether there was such an invasion and whether the same were tortious, were and are questions for the District Court to determine in the exercise of its jurisdiction to try title to the demanded assets. The charge was and is *conversion* as to personal property and *trespass* as to realty; it is respectfully urged that an assertedly sacrosanct administrative agent has no more right to commit torts of this nature, under color of official rectitude, than any other person.

The plain fact is that irrespective of how or for what reason the Los Angeles Bank was created, as soon as it acquired *property* in the course of its operations, it could only be deprived of that property through procedures

which satisfy the requirements of due process of law. (Compare *In re Carter,* D. C. Cir., 177 F. 2d 75, 77-8.)

As for the purported "dissolution" of the Los Angeles Bank, this is, of course, but part and parcel of the arbitrary attempt to denude it of its properties. Even the orders of March 29, 1946, recognize that before a Federal Home Loan Bank may be "dissolved," some attempt must be made (a) to dispose of its assets, and (b) to take care of its stockholders. Here the charge is that *neither* of these conditions precedent were lawfully carried out. The entire procedure embodied in the three orders is, therefore, subject to judicial scrutiny in the Los Angeles action in the course of trying title to the seized assets.

It is subject to examination in two aspects: (1) in the right of the Los Angeles Bank itself, and (2) in the right of appellee member associations.

And it is not to be overlooked that it is the latter to whom, even in the impossible event of a valid dissolution without a proper disposition of the Bank's assets, would descend the right of recovering those assets or, in the alternative, protecting them from spoliation. Appellants may not, therefore, avoid a judicial review of the activities of March 29, 1946, on any specious plea that the Los Angeles Bank no longer exists as a corporate entity; a plea which, to the credit of appellants, they do not stress, and which, if they did stress it, would merely point up the fact that in any event the District Court has jurisdiction to try title to the seized assets at suit of the member associations.

IV.

The Contention of Appellants That the Home Loan Bank Board and Its Members Are Indispensable Parties Is Devoid of Merit, As Is the Contention That These Are Unconsented Suits Against the United States.

Here again we find appellants ignoring the true nature of the *Los Angeles* action. It is Hornbook law that where a court has jurisdiction *in rem or quasi-in rem,* the principal function of the process of the court is to apprise parties having or claiming an interest in the *res* of the controversy in reference thereto, in order that they may appear, *if they so desire,* and protect their interests. And, under the pattern of old Judicial Code, Section 57 (28 U. S. C., Sec. 1655), absent defendants may be served by substituted process, which was here done in the case of Commissioner Fahey. Upon service thus being made, Commissioner Fahey had the right to appear or not, as he chose. He appeared by various motions, attacking jurisdiction both of the subject matter and over his person. His successor, the Home Loan Bank Board, has heretofore answered as to the merits while at the same time attempting to preserve the jurisdictional points.

For the purposes of jurisdiction of the District Court over the *Los Angeles* case, it is manifestly of no moment whether Fahey or the Board actually appeared or not. 28 U. S. C., Section 1655 provides (as did Judicial Code, Section 57 before it) that where the absent defendant does not, after substituted service, appear, the adjudication shall, as to him, "affect only the property which is the subject of the action."

It is only such a decree—one affecting only the property which is the subject of the action—which is sought

in the *Los Angeles* phase of the litigation. The prayer is that the assets and properties be recovered, that title in appellees be quieted and confirmed, and that any cloud occasioned by the three orders be removed.

In other words, so far as Commissioner Fahey and his present successor are concerned, the jurisdiction of the District Court to adjudicate title and right to possession of the demanded properties and assets attached at the moment service was made upon the late Commissioner. *Whether he was an indispensable party to this controversy or whether he was not, the District Court obtained jurisdiction then and there to adjudicate his claims, if any, with reference to the assets.*

Repeated decisions of the Supreme Court indicate, however, that neither Fahey nor the Home Loan Bank Board were or are indispensable parties to this controversy over title and right to possession of the seized Los Angeles Bank assets. The test, as laid down by the Supreme Court is whether or not the decree may be said to be capable of expending itself against the subordinate of the governmental agency involved; here, of course, the San Francisco Bank.

In *Williams v. Fanning,* 332 U. S. 490, the court held that the Postmaster General was not an indispensable party in an action brought to enjoin the local postmaster from carrying out a postal fraud order issued by the postmaster general after a hearing. The court cited authority for the proposition that a superior is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. It was held that the postmaster gen-

eral was not indispensable because the decree entered would effectively grant the relief desired *by expending itself on the subordinate official* who was before the court.

> "The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutger* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command." (P. 494.)

Similarly, in the present case, the decree will effectively grant the relief desired by expending itself on the San Francisco Bank, which is before the court and is in actual possession of the disputed assets. All that the court is asked to command is the reconveyance of the property and assets wrongfully and arbitrarily seized from the plaintiffs, accounting with reference to said assets and properties in the plaintiffs. None of this requires concurrence on the part of the Federal Home Loan Bank Board or any other non-resident defendant. The decree in order to be effective need not require the Board to do a single thing, either directly or indirectly.

Further illustrating that the Federal Home Loan Bank Board is not an indispensable party to this action are the following: *Hynes v. Grimes Packing Co.,* 337 U. S. 86. 96 (Secretary of the Interior not an indispensable party to a suit to enjoin the exclusion of commercial fishermen from shore line waters designated as an Indian Reservation by the Secretary, on the ground of the invalidity of the Secretary's order and regulation); *Jaeger v. Simrany,* 9 Cir., 180 F. 2d 650, 651 (Commissioner of immigration

not an indispensable party to a suit for declaratory judgment and injunction against a local immigration officer, to prevent him from proceeding to cancel the record of registry and a certificate of lawful entry of an alien); *Rank v. Krug* (D. C. S. D., Cal.), 90 Fed. Supp. 773, 802 (Secretary of the Interior and the United States not indispensable parties to a class suit to enjoin interference with plaintiff's water rights by reason of erection of dam under Federal Reclamation Laws); *Reeber v. Rossell* (D. C. N. Y.), 91 Fed. Supp. 108, 111 (Administrator of Veterans Affairs and Chairman of Civil Service Commission not indispensable parties in an action for declaratory judgment that the Administrator's order was null and void as against the plaintiffs); *National Radio School v. Marlin* (D. C., Ohio), 83 Fed. Supp. 169, 170 (Administrator of Veterans Affairs not indispensable party to suit to enjoin local veterans' finance officer and others from withholding issuance of vouchers for veterans' tuition). The Court of Appeals for the Sixth Circuit expressed the guiding principles in *Varney v. Warehime,* 147 F. 2d 238, as follows:

> "Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the Government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.
>
> "Approaching the subject from a practicable standpoint, we need not overlook the fact that the question of constitutionality or statutory power of a public

official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.

"The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality."

It therefore follows that neither Fahey nor the Federal Home Loan Bank Board were or are indispensable parties to this action; but in any event, as we have pointed out, the jurisdiction of the District Court to adjudicate title and the right to possession of these assets under Section 57 of the Judicial Code, as far as Fahey or the Board were or are concerned, attached immediately when substituted service on Fahey was completed, whether he was an indispensable party or not. (Compare *Jellenik v. Huron Copper Mining Co.,* 177 U. S. 1; *Harvey v. Harvey,* 7 Cir., 290 Fed. 653; *McRoberts v. Independent Coal & Coke Co.,* 8 Cir., 15 F. 2d 157.)

What we have said above also answers appellants' kindred contention that the Los Angeles suit is an action against the United States. It is no more such than were *Land v. Dollar, Williams v. Fanning,* or the other cases cited above to show that neither Fahey nor the Board were or are indispensable parties.

V.

Under the Plain Provisions of 28 U. S. C., Section 1655, the District Court Had and Has Power and Jurisdiction to Hear and Determine All Questions Material to the Claim of Los Angeles Bank and Its Member Associations That Their Respective Titles to the Assets and Properties in Dispute Should Be Quieted, That Clouds Upon Such Titles Should Be Removed and That Possession of Such Assets and Properties Should Be Restored to Their Rightful Owners.

28 U. S. C., Section 1655 is the federal expression of the conventional type of action to determine conflicting rights or claims as to real or personal property within the jurisdiction upon the basis of substituted service upon parties outside the jurisdiction. Appellants do not question the constitutionality of Section 1655, nor do they question the fact that acting under its provisions, a District Court has plenary jurisdiction to adjudicate titles, rights and interests in property.

Such being the case, Section 1655 is clearly a vehicle whereby under general law, within the meaning of the cases typified by *Land v. Dollar,* a party may litigate his claims to specific property. Such being the case, *Land v. Dollar* and its prototypes stand as authority for the proposition that any and all questions germane to the Los Angeles Bank's claim to its seized assets and properties may be litigated in the Los Angeles action and in the Los Angeles Bank cross-claim in the *Mallonee* action.

Appellants choose to ignore the plain language of Section 1655 and the holdings in cases of the *Land v. Dollar*

type, and insist that this is some type of review proceeding; and they say that the actions of the Commissioner are not reviewable.

In this they are in error in two different respects. In the first place, their claim to non-reviewability is belied by decisions such as that in the *Joint Anti-Fascist Committee* case cited above; cases which hold that the activities of public officers in excess of their authority may be scrutinized by the courts in any appropriate proceeding. We quote from the *Anti-Fascist* decision:

> "The respondents are not immune from such a proceeding. Only recently, this Court recognized that 'the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual . . . if it is not within the officer's statutory powers or, if within those powers . . . if the powers, or their exercise in the particular cases are constitutionally void.' *Larson v. Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 701-702. The same is true here, where the acts complained of are beyond the officer's authority under the Executive Order." (341 U. S. at p. 140.)

In the second place, this is not a review proceeding in the sense in which appellants use the term. It is, as we have pointed out, an action (we speak also of the cross-claim of the Los Angeles Bank in the *Mallonee* case) to quiet title to, to remove clouds from, and to regain possession of specific property. Here the administrative Orders, No. 5082, 5083 and 5084 amount to no more than the muni-

ments of *title* under which the San Francisco Bank claims the disputed assets. So far as this case is concerned, the orders in question are no more than purported *conveyances;* and certainly in a quiet title suit the court is fully empowered to adjudicate the validity of an asserted conveyance under which the defendant claims.

In this connection, it will have been noted that from time to time in appellants' brief the assertion is made that the actions below are "collateral" attacks upon the Commissioner's administrative orders. (We pass over the question of the inconsistency of this contention when compared with their other assertion that his orders cannot be reviewed at all.) Suffice it to say that in *any* action where a governmental officer, as here, acting in excess of his statutory authority, commits a common law tort (here trespass and conversion), he may not hide behind the governmental immunity and the courts are open to the despoiled party. (*U. S. v. Lee, supra; Land v. Dollar, supra;* and see *Scully v. Bird,* 209 U. S. 481; *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor,* 223 U. S. 280; *Philadelphia Co. v. Stimson,* 223 U. S. 605; *Waite v. Macey,* 246 U. S. 606; *Santa Fe P. Ry. Co. v. Fall,* 259 U. S. 197; *Work v. Louisiana,* 269 U. S. 250.)

The result is that to the extent that the scrutiny of the court below in this quiet title and possessory action is devoted to a consideration of the validity of the three orders to pass title or a right to possession as regards the Los Angeles Bank assets, the impact of the action upon the orders in question is certainly not collateral. It is

direct and immediate. But, as we have indicated elsewhere, the jurisdiction in these actions springs, not from any review power as such, but from the plenary power of a court of equity to try title, remove clouds, adjudicate the right to possession and enjoin the assertion of unfounded claims.

This situation is further pointed up by the fact that the answer of the San Francisco Bank admits that it claims the disputed assets solely under and by virtue of the three administrative orders, Nos. 5082, 5083, and 5084, above referred to; in other words, the sole muniments of title upon which it relies in this action *quasi-in rem* to quiet title, to remove clouds on title and to regain possession, are these three administrative orders. [12511 R. 9/4058, 4060-61, 4062-63, 4064-65, 4066, 4071, 4078-9, 4088.]

There is thus squarely presented for consideration in this quiet title suit, the question of whether these three orders (or for that matter, any one of them), did or did not operate to pass title and the right to possession of the disputed assets from the Los Angeles Bank to the San Francisco Bank. This question—whether a given instrument or instruments operated to transfer title to a given grantee—is a time honored and key issue which is always present in a quiet title suit. And *Land v. Dollar* and its companion cases are direct authority for the proposition that this question can only be decided on the merits. This means that the action must be tried, which in turn brings us to the question of the propriety of the award of attorneys' fees prior to trial by reason of services found to have been rendered in an action brought in good faith and on reasonable grounds.

VI.

Upon the Case Made by the Pleadings in the Actions Below and by the Findings in This Proceeding, Los Angeles Bank Is in Precisely the Same Situation as Is Any Corporation Whose Assets Are Seized by Public Authority in Visitatorial Proceedings.

A. In Such a Case, the Corporation, Acting in Good Faith, Is Entitled to Its Day in Court to Contest the Validity of the Seizure; and, Irrespective of Whether or Not a Case Is Ultimately Made Out for the Interference of State or Governmental Authority, It Is Entitled to an Allowance, Out of the Seized Assets, of Fees to Its Attorneys; Otherwise, as the Cases Say, It Would Be Hamstrung in Any Bona Fide Effort to Defend Itself.

The application of the Los Angeles Bank for an allowance of attorneys' fees was based upon those principles which are applicable in any case where a corporation which has been deprived of its assets opposes receivership or dissolution proceedings. Appellants are pleased to call this the "receivership" theory.

In such cases, it is well settled that where the resistance is made in good faith and on reasonable grounds (which the District Court found to be the facts here) an allowance of attorneys' fees out of the corporation's assets in the hands of the receiver or other custodian is within the discretion of the court, irrespective of whether the corporation's efforts are ultimately successful or not. (*Barnes v. Newcomb,* 89 N. Y. 108 (probably the leading case); *People v. Commercial Alliance Ins. Co.* (N. Y.), 42 N. E. 1044; *Anderson v. Great Republic Life Ins. Co.,* 41 Cal. App. (2d) 181 (rule stated); *Watson v. Johnson* (Wash.), 24 P. 2d 592; *Assets Realization Co. v. Defrees* (Ill.), 80 N. E. 263; *Goodyear Tire & Rubber Co.,*

Inc. v. United Motor Car & Supply Co. (N. Y.), 103 Atl. 471; *Pickerl Schaeffer & Ebelring v. Merion* (O. App.), 66 N. E. 2d 273; *Twyman v. Smith* (Fla.), 161 So. 427; *Pacific States Savings & Loan Co. v. Hise* (rule stated), 25 Cal. 2d 822; *Caminetti v. State Mutual Life Ins. Co.,* 52 Cal. App. 2d 326 (rule stated); and see note, 89 A. L. R. 1531; and compare *Eggert v. Pacific States Savings & Loan Co.,* 53 Cal. App. 2d 554.)

And it is worthy of note that, in receivership proceedings, an allowance of attorneys' fees by the court is a *preferred* claim against the assets of the corporation in the hands of the receiver. (*Barnes v. Newcomb, supra; Goodyear Tire & Rubber Co., Inc. v. United Motor Car & Supply Co., supra*; and see *People v. Commercial Alliance Inc., Co., supra.*)

The principle is akin to that which permits an allowance out of the corpus of a trust where the trustee defends against an attack upon the trust. (*Dingwell v. Seymour,* 91 Cal. App. 483; *Eggert v. Pacific States Savings & Loan Co., supra.*)

The rule and the reasons for its existence are well stated in the *Goodyear* case:

> "Application is not made under the provision of the statute providing for the payment of employees, but is based upon the inherent power of the court to direct paid, as a preferred claim, a reasonable sum for compensation of counsel employed by the corporation in good faith to defend the corporate existence of the company. I think the power exists. High on Receivers (4th Ed.) 439; Barnes v. Newcomb, 89 N. Y.

108; People v. Commercial Alliance Ins. Co., 148 N. Y. 563, 42 N. E. 1044. I adopt the language of the Court of Appeals in the latter case:

" 'The case of Barnes v. Newcomb, 89 N. Y. 108, is an authority for the proposition that a court of primary jurisdiction, in the exercise of its discretion, may authorize the receiver of an insolvent corporation, appointed in an action brought for its dissolution, which was defended in good faith by the corporation, though unsuccessfully, to pay as a preferred claim out of the fund in his hands a reasonable sum for the compensation of counsel employed by the corporation in defending the action. The principle upon which an allowance in such case may be made is that counsel fees are in the nature of expenses incurred by the corporation and its trustees in the protection and preservation of the trust which they represent; and, even if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees, to take all reasonable means for its protection.' " (103 A. at p. 471.)

The above principles were followed in California by *Anderson v. Great Republic Life Ins. Co., supra,* where the court stated:

". . . Neither party has cited any California authority in point and a search fails to reveal a California case on the question. However, there appears to be nothing in California law, statutory or otherwise, which precludes an application of the rule laid down in *Barnes v. Newcomb, supra,* and enunciated in *Watson v. Johnson,* 174 Wash. 12 (24 Pac. (2d)

592), 89 A. L. R. (1527), the latter cited by respondent. That rule may be summarized as follows:

"It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver. Whether such attorneys' fees and expenses are to be allowed rests in the sound discretion of the court, in view of all the facts and circumstances (Note, 89 A. L. R. 1531). If allowed, the question as to the amount thereof is likewise addressed to the sound discretion of the court. The claim of the officers of a corporation or of attorneys employed by them to be paid out of the funds in the hands of the receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine, first, the good faith and justification for such application, and second, if warranted, the amount to be allowed. (*Esarey v. Pierson*, 84 Ind. App. 109 (141 N. E. 87).) 'Even if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees, to take all reasonable means for its protection.' (*People v. Commercial Alliance Life Ins. Co.*, 148 N. Y. 563 (42 N. E. 1044.)" (41 Cal. App. 2d 190.)

The principle under discussion goes hand in hand with the kindred proposition that it is a fundamental right going to the heart of due process that a party to an action is entitled to independent counsel of his own choosing.

As said in the quiet title suit of *Roberts v. Anderson* (10 Cir.), 66 F. 2d 874:

> "The right to a hearing includes the right to the assistance of counsel of his own choice, if requested. Cooke v. United States, 267 U. S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767; Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158, 84 A. L. R. 527. In the case last cited, the Supreme Court said:
>
> " 'If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'
>
> "With these fundamental principles, which are embedded in this and every other government of free institutions, in mind, let us examine the proceedings before the county court which culminated in the determination here relied upon by appellant." (66 F. 2d at p. 876.)

The above principles established, it now remains to apply them to the factual pattern of these cases.

It is not in dispute, in fact the answer of the San Francisco Bank affirmatively alleged it [12511 R. 9/4060] that on March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over $45,000,000 of value in assets and properties. On that date the Commissioner and his subordinates, as the District Court here found [R. 1/293-4] without notice, hearing or trial,

(1) Seized the business, property and assets of the Los Angeles Bank and the property and assets of its member shareholders in its possession;

(2) Purported to *liquidate, consolidate, merge* and *dissolve* the Los Angeles Bank;

(3) By concerted action with the Portland-San Francisco Bank, transferred the business, properties and assets of the Los Angeles Bank to the Portland-San Francisco Bank *without consideration or corporate action or assumption of liabilities* on the part of the latter.

None of these findings are attacked by appellants. (Br., Specification of Errors, pp. 17-18.)

Under these facts, it is perfectly obvious that had the Commissioner (a) retained the seized assets and properties in his own possession, or (b) placed them in the possession of a receiver, a conservator or some other type of custodian, the principles above discussed with reference to the utilization of a seized corporation's funds in resisting the seizure would have full application. Does it have any the less application because *eo instanti,* the Commissioner transferred the physical possession of the seized assets to the (now) San Francisco Bank?

The answer is necessarily and obviously no. The District Court found, as we have seen, *and the finding is not under attack,* that in receiving the assets the San Francisco Bank was acting in concert with the Commissioner, that it rendered no consideration therefor and took no corporate action with reference to the acquisition of the assets other than the mere receiving of their possession. The District Court could hardly have declared in clearer terms that the San Francisco Bank was the creature and accomplice of and a co-conspirator with, the Commissioner as well as being an involuntary transferee, without consideration, of the assets of the Los Angeles Bank.

From this situation two results inexorably follow. First, far from being in possession of assets and properties which it has bought and paid for, as the San Francisco Bank's protestation of present ownership would seem to imply, it holds their mere possession subject to all the rights and equities of the despoiled Los Angeles Bank; which means that it is a constructive trustee. Second, and more importantly from the standpoint of the legal principles under discussion, being the mere creature of the Commissioner so far as the transfer of possession is concerned, the San Francisco Bank is in precisely the same position as if the Commissioner had committed the possession of the assets to a receiver or other custodian, or had kept them or instituted liquidation proceedings himself. (In this connection, it will be recalled that purported "liquidation" was one of the multiple aims of the three administrative orders.)

Under the findings of the District Court, the San Francisco Bank thus holds, not in its own right, but as the creature and accomplice and under the *aegis* of the then Commissioner and present Board. Such being the case, the principles for which appellees contend as regards the allowance of fees here made, have full application.

Indeed, the arguments of appellants to the contrary prove too much. They are completely answered by what was said in *Anderson v. Great Republic Life Ins. Co.:*

> "One of the arguments advanced by appellants should not go unnoticed, because of the implication therein. Appellants argue that since respondent was employed after the insurance company had been restrained from transacting any business or disposing of any of the assets and since the commissioner was appointed conservator of the insurance company shortly after respondent was so employed, the insur-

> ance company lacked the capacity to contract and it likewise lacked the capacity to impose a lien or charge upon the assets in the custody of the conservator by authorizing an attorney to render services to it. If such an argument were valid, the result would be obvious. An insurance company proceeded against by the commissioner would be hamstrung in any effort to defend itself, the hands of its directors would be tied and there would be no effective recourse from unwarranted official action. If this were the case the effect would be to deny the company the right to counsel and hence to due process of law. Since in such a proceeding as this all the funds of the corporation are placed in the hands of the conservator, an arbitrary denial to the corporation of the use of any portion of such funds to pay attorneys' fees amounts to the same thing as a denial of the right to contract for the services of an attorney, the effect of which would be a denial of the right to defend at all." (41 Cal. App. 2d at p. 193.)

The answer to appellants' main contention along this line therefore is that the present cases are cases in which an allowance, in the discretion of the Court, as "between solicitor and client," is proper, following the pattern of *Barnes v. Newcomb* and the other authorities we have cited above, and this is particularly true because the administrative orders in question contained flavors of both purported *liquidation* and *dissolution,* as well as transfer and merger as regards the Los Angeles Bank. (*Cf. Watson v. Johnson, supra,* 24 P. 2d 592, where an allowance of attorneys' fees in resisting state receivership and dissolution proceedings was made and upheld after the corporation had actually been dissolved.)

VII.

Under Such Circumstances, an Interim Allowance of Attorneys' Fees Is Proper. The Test Is Not That of Ultimate Success or Failure in the Litigation; It Is Whether or Not the Defense or the Cause of Action, as the Case May Be, Is, as the District Court Here Found, Conducted in Good Faith and on Reasonable Grounds.

In awards of the type here under discussion, ultimate success or failure in the litigation is wholly a false quantity, the test being, as we have seen, whether the litigation was conducted in good faith and on reasonable grounds.

In *all* of the cases we have heretofore cited under Point VI hereof in conjunction with *Barnes v. Newcomb,* and as well in that case itself, the attempt of the corporation, either as plaintiff or as defendant, to regain or to retain its assets was unsuccessful. Yet, as we have seen, each of those cases proclaimed the propriety of an allowance of attorneys' fees out of the corporate assets, in the discretion of the Court, upon its being satisfied, as the District Court was here satisfied, that the cause of action or defense was maintained in good faith and on reasonable grounds.

The result is, that ultimate success or failure in the litigation, insofar as concerns an award of the type here involved, is wholly irrelevant. This factor, therefore, affords no basis for argument against the propriety of an interim allowance.

The propriety of an interim allowance in a case such as this was declared in *Pacific States Savings & Loan Co. v. Hise,* 25 Cal. 2d 822, although no award was actually

made because the element of reasonable grounds was held to be lacking. Proceeding under the California Building and Loan Association Act, California Stats. 1931, page 483, as amended: Deering Act 986, the California Building and Loan Commissioner had seized the assets of Pacific States. The latter commenced an action to regain its assets and to test the validity of the seizure, which action was ultimately decided against it. On an *interim* application for fees the Court actually commented upon the fact that the application had not been made *sooner,* saying:

> "As pointed out earlier, the trial consumed approximately two years. Neither at its inception nor at any time during this period did Pacific States ask for an allowance of attorneys' fees, although it was at all times represented by competent counsel, nor does it now ask for attorneys' fees for these past services. Its application for an allowance of attorneys' fees was made after the commissioner had rested his case and was for future legal services to compensate counsel during the production of evidence by Pacific States. . . ." (25 Cal. 2d at p. 840.)

In upholding the denial of attorneys' fees, the Court in the *Hise* case stated:

> ". . . A seized association, as in the case of receiverships, is not entitled as of right to attorneys' fees and costs in resisting the seizure. An application therefor is addressed to the discretion of the trial court and should be granted only upon a showing that the resistance to the seizure is based upon reasonable grounds. . . ." (25 Cal. 2d at p. 841.)

The *Hise* case, therefore, stands as authority for the proposition that where, as here, good faith and reasonable grounds are found to be present, an *interim* allowance is properly within the discretion of the Court.

Another case involving Pacific States, *Eggert v. Pacific States Savings & Loan Co.,* 53 Cal. App. 2d 554, is squarely in point on the propriety of an *interim* allowance in a case where the right to possession of corporate assets is being defended, albeit the effort was ultimately held on appeal, affirming the judgment of the trial court, to have been unsuccessful.

In the *Eggert* action, certificate holders of Fidelity Savings & Loan Company, a building and loan association whose assets and properties had previously been taken over for purposes of liquidation by the State Building and Loan Commissioner, brought an action against Pacific States for the purpose of obtaining an adjudication that a previous transfer to Pacific States of the assets of Fidelity was, not an absolute transfer and sale of the assets, as claimed by Pacific States, but a transfer in trust for purposes of liquidation. Pending the litigation, Pacific States and its assets, including the disputed Fidelity assets in its possession, were also seized by the Building and Loan Commissioner, who thus became involved on both sides of the litigation and thereafter appeared as a neutral intervenor. Pacific States defended the action both in its own right and in the right of the disqualified Commissioner. After a long trial, judgment was entered decreeing, contrary to the contentions of Pacific States, that the transfer to it of the Fidelity assets had been a transfer in trust. Interim applications for attorneys' fees were then made to the trial court by

both plaintiffs and Pacific States. Fees were awarded to the plaintiffs on the trust fund recovery theory out of the recovered Fidelity assets.* As to the Pacific States application, the trial court found that its defense *vice* the disqualified and neutral Commissioner had been conducted in good faith and on reasonable grounds and ordered the Commissioner to pay the fees of Pacific States counsel out of the Pacific States assets in his possession. On appeal, this order was affirmed, the District Court of Appeal stating:

> "Appellant urges for reversal of the order two propositions, which will be stated and answered hereunder seriatim.
>
> *"First: The Superior Court of Los Angeles County is without jurisdiction to direct appellant to pay attorney's fees of respondent's counsel from the assets of Pacific States.*
>
> "This proposition is untenable. Appellant after taking possession of the assets of Fidelity and Pacific States, occupied the status of trustee of the assets of each of said corporations (*Evans v. Superior Court,* 14 Cal. (2d) 563, 573 [96 P. (2d) 107]), and it was his duty as such trustee to take all reasonable means for the protection of these assets for the benefit of the respective corporations, their stockholders, investment certificate holders, and creditors. Hence, when plaintiffs sought to have a trust im-

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*This order was not appealed from.

posed upon certain assets of the Pacific States, it was appellant's duty to defend against this attempt to impress a lien upon the assets of the trust which he was administering. Hence, he properly voluntarily intervened in the present action and thereby the court acquired jurisdiction *in personam* over appellant, which conferred upon the court, plenary powers with reference to all matters directly or incidentally arising with respect to the present litigation. (*Title Insurance & Trust Co. v. California Development Co.,* 171 Cal. 173, 197, *et seq.* [152 Pac. 542].)

"*Second: The trial court has no authority in an action of this nature to fix or allow respondent's attorney's fees.*

"This proposition is also untenable. It is the general rule that, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the trust assets, if the defense is conducted in good faith and on reasonable grounds. (*Trustees v. Greenough,* 105 U. S. 527, 532 [26 L. Ed. 1157]; see, also, Beach on Trusts and Trustees (1897), vol. 2, 1599, §698.) See, also, for the application of the same principle to an analogous situation. (*Anderson v. Great Republic Life Insurance Co.,* 41 Cal. App. (2d) 181, 190 [106 P. (2d) 75].) A different rule does not apply, even though the beneficiary is unsuccessful in the litigation. (*Dingwall v. Seymour,* 91 Cal. App. 483, 513 [267 Pac. 327].)" (53 Cal. App. 2d at pp. 557, 558.)

Several features of interest will be noted about the *Eggert* case. In the first place, Pacific States was resisting an attack upon its own assets in the hands of the Building and Loan Commissioner, a situation wholly analogous to that presented here, where the Los Angeles Bank is resisting an attack upon its own assets in the hands of an involuntary transferee and nominee of the Federal Home Loan Bank Commissioner. In the second place, there, as here, the defense of the assets was found to have been maintained in good faith and reasonable grounds. In the third place, the Court there had jurisdiction *in personam* over the Building and Loan Commissioner, as here it has jurisdiction *in personam* over the San Francisco Bank, the entity in actual possession of the Los Angeles Bank assets. In the fourth place, the award there, as here, was an *interim* award, for the *Eggert* judgment on the merits was appealed and finally affirmed by opinion of the District Court of Appeal rendered on February 23, 1943, reported at 57 Cal. App. 2d 239, whereas the judgment of that court affirming the order awarding attorneys' fees to Pacific States had been rendered on July 24, 1942. (52 Cal. App. 2d at p. 554.)

It is therefore submitted that the *interim* awards made below were perfectly proper; and we now turn to appellants' contentions regarding the fact that the District Court ordered the fees to be paid out of moneys in the registry of the Court.

VIII.

The District Court Did Not Err in Directing Payment of the Attorneys' Fees Out of Moneys in the Registry of the Court; and Appellants' Arguments to the Contrary Are Moot and Academic.

The contentions of appellants in this regard necessarily assume, in the abstract, the propriety of an order awarding fees to the appellees. Their only quarrel under this head relates to the source of the payments.

The order in substance provided that the fees should be paid out of moneys on deposit in the registry of the Court with no allocation or apportionment other than a provision that the funds and assets of the Long Beach Association should never bear any part of such allowance. [R. 1/310-311.]

Appellants, with all respect, waste considerable space in pointing out that certain other parties have funds on deposit in the registry of the Court which, they say, should not be devoted to the payment of the fee award. Again with all respect, we are impelled to remark that this is no concern of appellants. The other parties are not appealing from the order, and certainly appellants cannot be aggrieved if the burden of the fee award should fortuitously happen to fall on someone else.

Exception is also taken to the fact that the order exempts the Long Beach Association from the burden of the award. There is no reason why Long Beach should not be so exempted. Long Beach, like the Wilmington Association represented by Mr. Gilbert, is represented by its own counsel. And certainly, insofar as the award to the Los Angeles Bank is concerned, there is no reason whatever why Long Beach should stand any part of an award out of the assets and properties of the Los Angeles Bank in the hands of the San Francisco Bank.

Viewed thus in its proper perspective, and postulating, as appellants' contentions under this head do postulate, the propriety of an award out of the Los Angeles Bank assets in the hands of the Commissioner's involuntary transferee, appellants have no standing whatever to complain of an order awarding the fees out of moneys in the registry of the Court.

Nor is it necessary to analyze the components of the fund on deposit in the registry to arrive at this conclusion. The San Francisco Bank either has moneys in the registry or it has not. If it has not, appellants certainly have no ground for complaint. On the other hand, if it does have money in the registry (and, of course, it does), it is certainly no worse off if the fees are paid out of its moneys actually on deposit with the Court than it would be under a court order requiring it to pay over the amount of the fees out of Los Angeles derived funds held by it generally. The matter is merely one of bookkeeping, for nowhere does the San Francisco Bank deny that the Los Angeles derived funds in its possession are more than ample to cover the fees actually awarded.

It must be remembered—and appellants have a studied tendency to forget it—that the San Francisco Bank is here in precisely the same position as was the Building and Loan Commissioner in the Eggert fee appeal (53 Cal. App. 2d 554) wherein, it will be recalled, an order was affirmed which directed the Commissioner to pay over the amount awarded, since there, as here, the Court had "acquired jurisdiction *in personam* over appellant, which conferred upon the Court plenary powers with reference to all matters directly or indirectly arising with respect to the litigation. (*Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 197, *et seq.*

[152 Pac. 542].)" Whatever appellants' contentions with reference to the jurisdiction over other parties may be, it is not open for them to deny that the San Francisco Bank was sued, served and appeared below strictly *in personam*. Such being the case, the Court had jurisdiction to order payment either out of Los Angeles derived funds in its hands generally, or out of their equivalent heretofore deposited by the San Francisco Bank in the registry; and the San Francisco Bank is in no better position to complain in the one case than in the other.

It must be concluded, we submit, that appellants' arguments under this head are both moot and academic.

Conclusion.

It will have been noted that so far as this brief of these appellees is concerned, the award of fees to them has been treated entirely from the standpoint of an award to them as counsel for the Los Angeles Bank, as distinguished from the member associations which these appellees represent. This is pursuant to the position taken by them in the Court below that since everything done for the Bank had been done as well for and inured directly to the benefit of its member associations not otherwise independently represented in the action (namely, Long Beach and Wilmington), an award for services to the Bank would likewise cover the services rendered to such member associations, thus avoiding a doubling up of fees to these appellees. [R. 2/742-744.] Mr. Gilbert, representing the Wilmington Association, will, of course, present the matter from the association standpoint, which is, as it was in the lower court [R. 2/744], an additional reason for our not going into that field.

The same is true insofar as expanding the argument on the basic jurisdiction below is concerned. As in the earlier appeal in No. 12511, we have confined our argument to the jurisdiction of the District Court over the Los Angeles (as distinguished from the Mallonee) phase of the litigation.

Also, we have endeavored to confine our remarks to the basic questions presented on this appeal, to the exclusion of side issues. We see no point in dignifying such bizarre contentions as that the member associations of the Los Angeles Bank were not aggrieved by the seizure because their stock in that bank (*and for which they had paid $100 per share*) had, it is said, no market value. It will of course be recalled in this connection that millions of dollars of the assets of the member associations were, by *fiat* of the Commissioner and without their knowledge or consent, transferred to the San Francisco Bank; in other words, a plain case of conversion.

It is respectfully urged that the order appealed from should be affirmed and that the undertakings heretofore filed by appellees for return of these heretofore paid fees in the event of reversal should be ordered delivered up to appellees for cancellation.

Respectfully submitted,

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